after the end of term and pays rent and in the absence of rebutting circumstances, the court implies that the tenant holds upon such terms of the old lease etc. In the instant case, the controversial rent was paid before the end of the term or period.

The aforesaid conclusion could be put in another way which would show my thinking in detail about it, ie that the landlords' claim to possession on the undisputed expiry of the term of tenancy was so clear that the court ought to decide and did decide it at once in favour of the landlords. Such being the case, Lord Diplock's requirements as stated in *American Cyanamid* v *Ethicon Ltd*[3] about the applicant for an interlocutory injunction having had to satisfy the court of a serious question to be tried and about, pending the trial of such serious question, such applicant having had to satisfy the court on a balance of convenience would become unnecessary for the landlords in the instant case on its special facts.

In case I was wrong on the above reasoning, I had considered that in any event, the landlords had shown a serious question for trial; that the claim being related to trespass, damages would not be an adequate remedy, and that on the balance of convenience, greater hardship would be caused to the landlords by refusing the injunction on a consideration of facts set out earlier in connection with such balance of convenience. I therefore granted the injunction restraining the tenant from remaining or continuing in occupation of the said two shop lots; ordering also a suspension for one month of the operation of the said injunction order to enable the tenant to vacate from there and costs.

Application allowed.

Solicitors: *Kean Chye & Sivalingam; Maxwell, Kenion, Cowdy & Jones.*

Reported by *PS Ranjan*

Roxy Electric Industries (Malaysia) Bhd v Syarikat Nominee Bumiputra Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) - CIVIL SUIT NO D4-22-926-89
ZAKARIA YATIM J
9 JUNE 1989

Companies and Corporations - Extraordinary general meeting - Requisition and notice issued by shareholders holding more than 10% of issued capital - Whether requisition and notice bad in law - Whether defendants acting in concert - Whether there was takeover of company - Companies Act 1965, ss 144 & 179 - Malaysian Code on Takeovers and Mergers 1987, r 2

Civil Procedure - Company applying for injunction to restrain meeting - Whether test in American Cyanamid applicable - Plaintiffs to show strong case - Whether grant would give judgment to plaintiffs - Risk of injustice

Words and Phrases - 'Members' - 'Takeover' - 'Acquirer' - 'Acting in concert' - Companies Act 1965, ss 16 & 179, Malaysian Code on Takeovers and Mergers 1987

The plaintiffs applied for an injunction against the first and second defendants from convening, calling, holding or conducting an extraordinary general meeting of the plaintiffs for any or all of the purposes and objects set out in the notice of requisition issued by both defendants, and from removing or attempting to remove or taking steps to alter the composition of the plaintiffs' board of directors. On 4 April 1989, a requisition for an EGM of the plaintiffs under s 144 of the Companies Act ('the Act') accompanied by a special notice of several resolutions intended to be tabled were served on the plaintiffs by the fourth defendant. The requisition stated that the first and second defendants were the registered holders of ordinary shares in the plaintiffs representing more than 10% of the total voting rights. The resolutions to be considered at the EGM were for the purpose of removing the five existing directors of the plaintiffs and appointing the seventh to twelfth defendants as directors. The plaintiffs contended that the requisition and notice were bad in law as they did not bear the common seals of the first and second defendants and were not executed by authorized representatives. Further, the requisition and notice was not a bona fide move to hold a meeting of the plaintiffs' shareholders but an attempt on the part of the defendants to take over the plaintiffs.

Held, dismissing the application:

(1) Section 144(2) of the Act states that the requisition shall state the objects of the meeting; it shall be signed by the requisitionist, and it shall be deposited at the registered address of the company. There was no ambiguity in the objects of the meeting as the requisition expressly stated that the meeting was for the purpose of considering and, if thought fit, passing the resolutions stated therein. By affidavits filed on behalf of the first and second defendants, it was averred that the requisition was executed and/or signed by persons duly authorized to execute the documents on their behalf. Neither the Act nor the articles of association of the plaintiffs required the documents to bear the common seals of the requisitionists.

(2) It was admitted by the plaintiffs that the first and second defendants were registered owners of more than 10% of the plaintiffs' total issued and paid-up share capital as at 4 April 1989. Once shares were registered in their names they became

members of the plaintiffs and were entitled to vote. As such they were entitled to issue the requisition and notice.

(3) There was no takeover as defined in the Act. It is clear that there must be an acquisition of shares by the acquirer. There was no evidence of acquisition of shares and the burden is on the plaintiffs to prove that the defendants had acquired shares in addition to what they already had. As the plaintiffs admitted that the defendants had a total of 36.46% of the plaintiffs' paid-up capital, the question of acquiring more shares for the purpose of taking over under s 179 did not arise. Persons may only act in concert to effect a takeover if the total percentage of their voting right is less than 33%. Further, the meeting of 3 May 1989 was an extraordinary general meeting attended by the directors of the plaintiffs with the defendants and it cannot be said that the defendants were then acting in concert.

(4) The court should be cautious in applying the principle of circumstantial evidence at an interlocutory stage where it is relying on affidavit evidence.

(5) In considering whether an interlocutory injunction ought to be granted, the principles laid down in *American Cyanamid* should be applied. However, in a case where an injunction sought by the plaintiff would mean giving him judgment against the defendant without permitting the defendant the right of trial, the court will not consider whether there is a serious question to be tried or look at the balance of convenience since the defendant should not be precluded by the grant of an interlocutory injunction from disputing the plaintiff's claim. The test to be applied would be (a) whether the grant or refusal of an injunction would put an end to the matter without trial and (b) the court has to consider the balance of the risk of doing an injustice. In this case, if the court grants an injunction, the requisition would have no effect and there will be no trial of the action. This would mean giving the plaintiffs judgment and the defendants would have no opportunity to bring the case to trial. Further, the risk of doing an injustice is greater if the injunction is granted. Substantial justice to the shareholders would be done if they were given the opportunity to elect their new directors. Whether the defendants would succeed in passing the resolution is a matter for the shareholders to decide.

(6) The court will grant an injunction to prevent a meeting if the provisions of law were not complied with or to prevent a clear abuse of powers on the part of the directors. The plaintiffs must have a strong case to restrain a meeting of the shareholders, and in this case they failed to do so.

Cases referred to

1 *Pender* v *Lushington* [1877] 6 Ch D 70 (follld)
2 *Siemens Brothers & Co Ltd* v *Burns* [1918] 2 Ch 324 (follld)
3 *Dominion Mining NL* v *Hill & Anor* [1971-76] 27 ACLC (refd)
4 *Chan Chwen Kong* v *PP* [1962] MLJ 307 (distd)
5 *Jayaram* v *PP* [1982] 2 MLJ 306 (distd)
6 *The King & AG of the Commonwealth* v *Associated Northern Collieriers & Ors* [1911] 14 CLR 387 (distd)
7 *Mohamed Zainuddin bin Puteh* v *Yap Chee Seng* [1978] 1 MLJ 40 (refd)
8 *American Cyanamid Co* v *Ethicon* [1975] 2 WLR 316 (distd)
9 *Cayne & Anor* v *Global Natural Resources* [1984] 1 All ER 225 (follld)
10 *Matang Holdings Bhd & Ors* v *Dato Lee San Choon & Ors* [1985] 2 MLJ 406 (refd)
11 *Last & Anor* v *Buller & Co* 36 TLR 35 (refd)
12 *Burland & Ors* v *Earle & Ors* [1902] AC 83 (refd)
13 *Theseus Exploration NL* v *Mining & Associated Industries Ltd* [1973] Qd R 81 (refd)
14 *Humes Ltd* v *Unity APA Ltd & Anor* [1987] 5 ACLC 15 13 ACLR 507(refd)
15 *Punt* v *Symons & Co Ltd* [1903] 2 Ch 506 (refd)

Legislation referred to

Companies Act 1965 ss 144, 179
Malaysian Code on Takeovers and Mergers 1987 r 2

KK Chan (*A Leong* with him) for the plaintiffs.
DP Naban for the first defendant.
Sofia Chew (*Ms*) for the second defendant.
C Abraham for the third, fourth, fifth and sixth defendants.
SP Lim for the seventh defendant.

Cur Adv Vult

Zakaria Yatim J: This is an application by the plaintiffs, Roxy Electric Industries (Malaysia) Bhd (hereinafter referred to as 'Roxy') for an injunction to restrain the first defendant, Syarikat Nominee Bumiputra Sdn Bhd (hereinafter referred to as 'Nominee Bumiputra') and the second defendant, Visia Nominees Sdn Bhd (hereinafter referred to as 'Visia Nominees') whether by themselves or by their servants or agents or nominees, (a) from convening, calling, holding or conducting an extraordinary general meeting ('EGM') of Roxy for any or all the purposes and objects set out in the notice of requisition dated 4 April 1989 issued by Nominee Bumiputra and Visia Nominees; and (b) from removing or attempting to remove or taking any step to alter the composition of Roxy's board of directors. The application was heard inter partes.

Roxy is a public company limited by shares. Its shares are listed on the Kuala Lumpur Stock Exchange and the Stock Exchange of Singapore. Nominee Bumiputra is a wholly-owned subsidiary of Bank Bumiputra Malaysia Bhd ('Bank Bumiputra'). Nominee Bumiputra is a registered holder of 10,975,680 shares in Roxy. Visia Nominees is a subsidiary wholly-owned by Visia Finance Bhd. Visia Nominees is a registered holder of 21,739,732 shares in Roxy. The third defendant, Dato' Alexander Yu Lung Lee ('Dato' Alex Lee') was a former managing director of Roxy. He is the beneficial owner of 5,612,697 shares registered in the names of various nominees. The fourth defendant, Mr Christopher Fook Hong Lee ('Mr Christopher Lee') is the son of Dato' Alex Lee and a former director of Roxy. The fifth defendant, Irex Sdn Bhd, is a company owned directly or indirectly by Dato' Alex Lee and his children. The sixth defendant, Tun Sir Henry HS Lee and Sons Sdn Bhd ('Tun HS Lee Bhd') is a company controlled directly or indirectly by members of the family of the late Tun Sir Henry HS Lee, the father of Dato Alex Lee.

On 4 April 1989 a requisition for an EGM of Roxy under s 144 of the Companies Act 1965 accompanied by a special notice of several resolutions intended to be tabled at the EGM were served on Roxy by Mr Christopher Lee.

The requisition and the special notice were signed by Nominee Bumiputra and Visia Nominee and dated 4 April 1989. In the requisition they stated that they were the registered holders of ordinary shares in Roxy representing more than 10% of the total rights for all members having a right to vote at general meetings of Roxy. The resolutions to be considered at the EGM were for the purpose of removing the five existing directors of Roxy and to appoint in their stead Mr James Puthucheary, the seventh defendant, Mr Lim Keng Guan, the eighth defendant, Mr Yeo Eng Seng, the ninth defendant, Encik Zaki Tun Azmi, the tenth defendant, Dato' Wong Soon Poh, the eleventh defendant and Mr Goh Joon Hai, the twelfth defendant.

On 25 April 1989 Roxy wrote to the requisitionists informing each of them that the board of directors would not convene the EGM. In the letter it was stated that the requisition lacked formal particulars. It also stated that the notice was illegal, null and void and of no effect and not binding upon the board of directors. The letter further stated that the EGM of Roxy could not be convened. On 27 April 1989, Roxy filed a writ against all the defendants and on 28 April 1989 the present application was filed.

Roxy's first contention was that the requisition and the special notice were bad in law and therefore had no effect. In his affidavit affirmed on 28 April 1989, Encik Hamdan bin Mohamad, a director of Roxy, ('Hamdan's first affidavit') averred in para 12(b) that the requisition and special notice did not bear the common seals of Nominee Bumiputra and Visia Nominees and the documents were not duly executed by authorized representatives of Nominee Bumiputra and Visia Nominees and registered with Roxy.

The question for the court to consider is whether the requisition and special notice were bad in law as alleged by Roxy. Subsection 2 of s 144 states that (1) the requisition shall state the objects of the meeting; (2) it shall be signed by the requisitionist; and (3) it shall be deposited at the registered office of the company.

With regard to the objects of the EGM, the requisition expressly stated that the meeting was for the purpose of considering and, if thought fit, passing the resolutions stated therein with or without modification. In my view there is no ambiguity in the objects of the meeting. The directors of Roxy understood clearly what the objects of the meeting were. In para 10 of the same affidavit, Encik Hamdan said that the cumulative effect of exhs P6 and P7 (namely, the requisition of the special notice) if carried at the EGM would be the removal of the board of directors of Roxy as presently constituted and the replacement of the board by the seventh, eighth, ninth, tenth, eleventh and twelfth defendants.

As to the second requirement there is evidence that the requisition and the special notice were signed by the authorized officers. In her affidavit affirmed on 12 May 1989, Zauyah Wan Chik, an officer of Bank Bumiputra and a director of Nominee Bumiputra ('Zauyah's first affidavit') averred in para 3, that the requisition was executed and/or signed on behalf of Nominee Bumiputra by herself and she was duly authorized to execute the document on behalf of Nominee Bumiputra.

Mr Lim Seng You, a company secretary of Visia Nominee, in his affidavit affirmed on 12 May 1989, stated that the requisition was executed by Mr Ooi Sang Kuang, the chief executive officer for and on behalf of Visia Nominees. He said that Mr Ooi Seng Kuang was duly authorized to execute the said requisition on behalf of Visia Nominees. As to the third requirement it is not in dispute that Mr Christopher Lee served the requisition and the special notice on Roxy. Subsection (2) does not require the documents to bear the common seals of the requisitionists. The articles of association of Roxy also do not contain such requirement.

In my view the requisition and the special notice complied with the requirements of sub-s (2) of s 144, and the articles of association of Roxy.

The next question to consider is whether the requisitionists were entitled to issue the requisition and the special notice under s 144. Under sub-s (1) members may requisition for an EGM if they are holding, at the date of the deposit of the requisition not less than one-tenth of the paid-up capital as at the date of the deposit. The word 'members' in sub-s (1) has been defined in s 16(6) of the Companies Act, which states:

> The subscribers to the memorandum shall be deemed to have agreed to become members of the company and on the incorporation of the company shall be entered as members in its register of members, *and every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company.* (Emphasis added).

Under art 12 of the articles of association of Roxy, every person whose name is entered as a member in the register of members is entitled to receive a share certificate. Therefore, a member of a company is a person whose name is on the register of shareholders. The register is the only evidence by which the rights of members to vote at a general meeting can be ascertained: *Pender* v *Lushington.*[1]

It is admitted by Roxy in para 6 of Hamdan's first affidavit that based on information in Roxy's register of members and other statutory registers required to be maintained by Roxy, Nominee Bumiputra and Visia Nominees were shown to be the registered owners of the number of shares as at 4 April 1989 appearing against their names as follows: Nominee Bumiputra - 12,082,680 shares; Visia Nominees - 21,739,732 shares.

The shareholding of Nominee Bumiputra and Visia Nominees, taken together constituted about 24.9% of

Roxy's total issued and paid-up share capital.

It is not in dispute that Bank Bumiputra and Visia Finance received Roxy shares from various persons as security for money lent to them. These shares were registered in their nominees, namely, Nominee Bumiputra and Visia Nominees respectively. This is the modern practice of banks and financial institutions and this practice is recognized by Roxy, Nominee Bumiputra and Visia Nominees in their respective affidavits. See JM Holden, *The Law and Practice of Banking* (7th Ed) Vol 2 p 269. Once the shares were registered in their names, they became members of Roxy and were entitled to exercise voting rights at Roxy's meetings. See *Siemens Brothers & Co Ltd* v *Burns*.[2]

In my opinion, Nominee Bumiputra and Visia Nominees were registered members holding more than one tenth of Roxy's paid-up capital and accordingly they were entitled to issue the requisition and the special notice under s 144(1) of the Companies Act.

Mr Naban rightly submitted that the issuance of requisition by members of a company is an important right given by statute to members so that they might be able to attend a general meeting and exercise their right to vote. In my view the directors of Roxy were wrong when they informed the requisitionists by a letter dated 25 April 1989, that they would not convene the EGM on the ground that the requisition was 'lacking in formal particulars.' Encik Hamdan was also wrong when he said in his first affidavit that the requisition and special notice did not bear the common seal of Bumiputra Nominee and Visia Nominees. In *Dominion Mining NL* v *Hill & Anor*,[3] Street J said, at p 27219:

> I am strongly deposed towards upholding the validity in a technical sense of the convening of this meeting if that course is properly open under the documents and within the evidence. The courts should not be astute to frustrate attempts by a large number of members, holding a large proportion of shares in a company, to give voice to their wishes through the machinery of a meeting. I have little sympathy with directors who, having chosen to disregard the spirit of s 137, attempt to take technical points to prevent shareholders validly assuming the initiative in summoning a meeting.

Mr Sri Ram submitted that the deposit of the requisition and special notice was not a bona fide move to hold a meeting of Roxy's shareholders but it was an attempt on the part of the defendants to take over Roxy. He referred to Hamdan's first affidavit where in para 17 it was alleged that the 'first, second, third and fourth defendants are and were at all material times acting jointly or in concert in the preparation, issuance and service' of the requisition and the special notice. The deponent of the affidavit alleged that the preparation and/or issuance of and/or the service of the requisition and the special notice and the proposal to hold and convene and conduct the EGM and the business to be transacted at the meeting as envisaged in the requisition and the special notice were in contravention of s 179 of the Companies Act. In support of the allegation, Hamdan, in the same affidavit averred that on the afternoon of 20 April 1989, a meeting was held at the offices of Nominee Bumiputra where several representatives of banks and financial institutions who were registered members were present. He added that Dato' Alex Lee and Mr Christopher Lee were present at the meeting. According to him those who were present at the meeting were briefed by a solicitor whose identity he was not aware of. Mr Sri Ram also referred to the extraordinary general meeting of Roxy held on 3 May 1989. According to Hamdan's affidavit affirmed on 13 May 1989 ('Hamdan's second affidavit'), at that extraordinary general meeting Nominee Bumiputra was represented by a proxy holder, who was also proxy for certain other registered shareholders of the plaintiffs. He alleged that most of the other registered shareholders were also nominees of financial institutions with whom Dato' Alex Lee, Mr Christopher Lee, Irex Sdn Bhd and Tun HS Lee Bhd or a combination of two or more of them had pledged Roxy shares as security for loans borrowed by one or more of them. He added that at that meeting a resolution prepared by the directors of Roxy was amended. According to Hamdan the 'instructions given by 'Nominee Bumiputra and Visia Nominees' to the respective proxy holders is yet another circumstance confirmatory to the plaintiffs' contention that the first, second, third, fourth, fifth and sixth defendants are and were at all material times acting in concert to effect a takeover of the plaintiff in breach of written law.'

The question for the court to consider now is whether the defendants were attempting to take over Roxy. Section 179(1) defines the term 'takeover' in the following words:

> 'takeover' means an acquisition of shares in a company which, when aggregated with shares already held by the acquirer, would give the acquirer the right to exercise or control the exercise of more than 33 per centum of the voting right of that company.

The word 'acquirer' is defined in the same section to mean, inter alia, two or more persons who, acting in concert with one another, effect or propose to effect a takeover of a company whether they effect the takeover themselves or by an agent.

It is clear from s 179, that there must be an acquisition of shares by the acquirer. There is no evidence of acquisition of shares by the defendants in the present case. The burden is on the plaintiffs to prove that the defendants had acquired shares in addition to what they already had. This the plaintiffs had failed to do. In fact on the figures submitted by the plaintiffs, it was admitted that the defendants had a total of 49,481,733 shares which constituted 36.46% of Roxy's paid-up capital. These figures were prepared and presented to the court (as encl 19) by Mr Sri Ram. Since there was already 36.46% of the paid-

up capital of Roxy owned by the defendants, the question of acquiring more shares for the purpose of taking over under s 179 did not arise at all. The allegation that the defendants were acting in concert for the purpose of effecting a takeover has no foundation whatsoever. Persons may only act in concert to effect a takeover if the total percentage of their voting right in a company is less than 33%. In my view there is no reason for the defendants to act in concert in view of the total number of shares registered in their names.

The allegation that the first to sixth defendants were acting in concert at a meeting held on 20 April 1989 is misconceived. If at all there was an attempt to take over Roxy, the acquisition of shares would have been completed before that date. Similarly the allegation that at the meeting held on 3 May 1989, the defendants were acting in concert for the purpose of effecting a takeover had no basis in the circumstances of this case.

The meeting held on 3 May 1989 was not a meeting of the defendants only. It was an extraordinary general meeting attended by the directors of Roxy as well. The defendants cannot be said to be acting in concert. Rule 2 of the Malaysian Code on Take-overs and Mergers 1987 (PU(B) 173) defines 'acting in concert' as follows:

> 'Acting in concert'. Persons acting in concert comprise persons who, pursuant to an agreement or undertaking (whether formal or informal) actively cooperate, through the acquisition by any of them, of shares in a company, to obtain or consolidate control of that company ...

Mr Sri Ram enumerated certain facts and asked the court to draw an inference that the defendants had a common purpose to take over the affairs of the company. The following are the circumstances mentioned by him:

(1) The meeting sought by the requisition and special notice jointly made by Nominee Bumiputra and Visia Nominees served on 4 April 1989 on Roxy by Mr Christopher Lee, who is the son of Dato' Alex Lee. Mr Christopher Lee was not an officer of Nominee Bumiputra or Visia Nominees.

(2) The requisition itself called for displacement of the Board of new directors proposed by Nominee Bumiputra and Visia Nominees. It was a fair inference that Nominee Bumiputra and Visia Nominees intended that the seventh to twelfth defendants should do their bidding on the board of Roxy. It showed intention to control the board of Roxy.

(3) Both Nominee Bumiputra and Visia Nominees at all material times had a common interest and a common intention. This was to be deduced from their engaging the same solicitors on 4 April. Later they had separate solicitors. Mr Sri Ram submitted they came to be aware of the difficulty in which they might find themselves. Roxy gave notice that it would raise this point.

(4) Meeting of 20 April 1989. Here there was a telling evidence that it was convened at the invitation of Nominee Bumiputra. However Nominee Bumiputra has said on oath that that meeting was held at the invitation of its solicitors.

(5) Dato' Alex Lee and Mr Christopher Lee were present and participated at the meeting of 20 April. They said their presence there was merely formal. The court might take into account the fact that Mr Christopher Lee had said Dato' Alex Lee had no interest in Irex Sdn Bhd because of the trust. If he was not having any interest why was he present?

(6) The proposed appointments of the seventh to twelfth defendants. Nominee Bumiputra and Visia Nominees proposed them. But they did not choose them. The court can draw an inference that these people must have been approached by them. Dato' Alex Lee and Mr Christopher Lee must have some knowledge. Why did they not tell the truth? What were they afraid of disclosing? Similarity in the language of the affidavits and the correspondence in the way in which points were taken. By itself it might mean nothing.

(7) Amendment to the resolution. Enclosure 11 pp 52 and 53 which was proposed by directors of Roxy and passed at a meeting on 3 May 1989. This resolution was amended as shown at p 63 of encl 15. There was continuing intention to act in concert even after 20 April.

(8) The 11 letters enclosing draft amendments were sent to several shareholders, all of whom are financial institutions. One of them is Nominee Bumiputra's holding company - Bank Bumiputra. No evidence these letters were sent to Dato' Alex Lee and Mr Christopher Lee. No reason for them to send to Bank Bumiputra because they were acting for Bank Bumiputra.

(9) At the meeting of 3 May 1989 amendments proposed by Nominee Bumiputra's proxy and supported or seconded by Visia Nominees' proxy? Mr Sri Ram submitted this showed that even at the 3 May meeting they were continuing to act in concert.

(10) Enclosure 15 p 64 (exh PL28) read with P26 p 60 - items 2 and 4.

(11) There was a history of the third, fourth, fifth and sixth defendants having acted in concert with the third party UIC.

(12) The fact that the affidavit filed by Mr Christopher Lee for himself and for Dato' Alex Lee and Irex Sdn Bhd. Paragraph 4 encl 17, Sir HS Lee Sdn Bhd also included. Therefore the third to sixth defendants always had common interest.

(13) There had been no full disclosure of relevant documents by Nominee Bumiputra or Visia Nominees relating to the pledge. Either Nominee Bumiputra

or Visia Nominees hold shares for themselves or they were acting on someone's instructions because they were nominee companies.

Mr Sri Ram submitted that the court can draw the inference from the circumstances as stated by him. In support of his submission he cited two criminal cases, namely *Chan Chwen Kong* v *PP*,[4] and *Jayaram* v *PP*.[5] In the *Chan Chwen Kong* case, Thomson CJ (as he then was) in his judgment said:

> It must, however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

In *Jayaram's* case,[5] the Federal Court held that in a case depending on circumstantial evidence it was enough if the court merely said that it was satisfied of the accused's guilt beyond reasonable doubt without further saying that the facts proved irresistibly pointed to one and only one conclusion, namely, the accused's guilt.

Mr Sri Ram submitted that in the present case there is sufficient evidence, not inherently incredible, and not inherently improbable, to support a conclusion, albeit prima facie, that the first to sixth defendants were acting in concert within the meaning of s 179(1)(6).

Mr Sri Ram also cited an Australian case, *The King and the Attorney-General of the Commonwealth* v *The Associated Northern Collieries and Others*.[6] In that case the High Court of Australia stated the common law principle as follows:

> Community of purpose may be proved by independent facts, but not necessarily so. If the other defendant is shown to be committing other acts tending to the same end, then though primarily each set of acts is attributable to the person whose acts they are, and to him alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that such separate acts were the outcome of pre-concert, or some mutual contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge.
>
> An unlawful conspiracy may be inferred from the conduct of the parties, and if several men are seen taking several steps, all tending towards one obvious purpose, and they are seen through a continued portion of time taking steps that lead to one end, it is for the jury to say whether those persons had not combined together to bring about that end which their conduct appears so obviously adapted to effectuate.
>
> Once the combination and its purposes are proved, the acts of any party to it in furtherance of those purposes are attributable to all, as being within the scope and in execution of their common agreement. No act which is not done in furtherance of the common purpose comes within that principle of admissibility.

In its judgment, the court said:

> I quote as apposite to the present circumstances, and as expressing my opinion on arguments addressed to the court, a passage from *Russell on Crimes* (7th Ed) Vol 1 p 191.
>
> The evidence in support of an indictment for a conspiracy is generally circumstantial; and it is not necessary to prove any direct concert, or even any meeting of the conspirators, as the actual fact of conspiracy may be collected from the collateral circumstances of the case. Although the common design is the root of the charge it is not necessary to prove that the defendants came together, and actually agreed in terms to have the common design, and to pursue it by common means, and so to carry it into execution, for in many cases of the most clearly established conspiracies there are no means of proving any such thing. If, therefore, two persons pursue by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of a common object they are pursuing, the jury are free to infer that they have been engaged in a conspiracy to effect that object. It is not necessary to prove the existence of a conspiracy before giving in evidence of the acts of the alleged conspirators, and isolated acts may be proved as steps by which the conspiracy itself may be established. In *R* v *Duffield*, Erle J directed the jury that it does not happen once in a thousand times when the offence of conspiracy is tried that anybody comes before the jury to say that he was present at the time when the parties did conspire together, and when they agreed to carry out their unlawful purposes; that species of evidence is hardly ever to be adduced before a jury; but the unlawful conspiracy is to be inferred from the conduct of the parties; and if several men are seen taking several steps, all tending towards one obvious purpose, and they are seen through a continued portion of time taking steps that lead to one end, it is for the jury to say whether those persons had not combined together to bring about that end, which their conduct appears so obviously adapted to effectuate.

It should be noted that the English rule on circumstantial evidence in criminal law was applied in that case.

I should point out here that the *Associated Northern Collieries'* case,[6] and the two criminal cases referred to above were decided after trials. The facts in those cases were proved. The court should be cautious in applying the principle of circumstantial evidence in those cases to the present case. The present case is only at an interlocutory stage where the court is relying on affidavit evidence.

Even if the rule relating to circumstantial evidence applies in the present case, the question is whether, from all the circumstances enumerated by Mr Sri Ram, this court can come to the conclusion that the defendants were acting in concert for the purpose of effecting a takeover of Roxy? Mr Cecil Abraham, counsel for Dato' Alex Lee and his son, submitted that the circumstances stated by Mr Sri Ram occurred after 4 April 1989, that is, the date of the requisition. I agree with Mr Abraham's submission. If the circumstances occurred after 4 April 1989, the court cannot draw an inference or reach a conclusion that the defendants were acting in concert to effect a takeover of Roxy.

The plaintiffs alleged that Dato' Alex Lee's and Mr Christopher Lee's presence at the meeting on 20 April 1989 showed that the defendants were acting in concert. Mr Cecil Abraham replied that Dato' Alex Lee and Mr Christopher Lee had a direct and indirect interest in Irex Sdn Bhd to justify their presence at the meeting. According to the documents exhibited to Hamdan's affidavit and according to the figures prepared by Roxy, Irex Sdn Bhd held 21,647,624 shares which were registered in the names of various nominees.

Finally, item 11 in the list of circumstances mentioned by Mr Sri Ram alleged that the third, fourth, fifth and sixth defendants had acted in concert with a third party. In Hamdan's second affidavit he averred as follows:

> ... in or about the month of August 1988, the plaintiff commenced a rights issue exercise to enable one United Industrial Corporation Limited ('UIC') to take over a controlling interest in the plaintiff. The rights issue exercise however was subsequently abandoned for reasons which are not relevant to the instant proceedings ... In the aforesaid rights issue exercise, the third defendant and companies controlled by his family declared themselves as interested parties and assigned all their rights to UIC. Simultaneously, certain other beneficial owners of shares which were registered in the name of the second defendant as nominee also declared themselves as interested parties in the rights issue exercise and also assigned all their rights to UIC. These assignments were made in order to assure that UIC would have a controlling interest of the plaintiff at the conclusion of the aforesaid exercise. In exh P24, the third defendant together with members of his family and companies controlled by his family were declared as parties acting in concert with UIC. In this context, there is now produced and shown to me and marked as exh P25 a letter dated 31 October 1988 from the Panel On Takeovers and Mergers addressed to solicitors for UIC. *The attempted takeover of the plaintiffs by UIC acting in concert with the third defendant, members of his family* (including the fourth defendant) *and his group of companies* (including the fifth and sixth defendants) *having failed*, the third, fourth, and fifth defendants are now acting in concert with the first and second defendants to now effect a takeover of the plaintiffs by acting in breach of s 179 of the Companies Act 1965 and other related legislation. (Emphasis added).

From what I understand in the passage quoted above, the allegation that the three defendants were acting in concert to take over Roxy had failed. This means that there was no acquisition of shares and there was no takeover. In the circumstances the UIC issue has no relevance to the present case.

In my view, even if circumstantial evidence is relevant at the present stage of the proceedings, all the circumstances must be considered as a whole. Each fact cannot be taken in isolation. Since most of the facts occurred after 4 April 1989, the rest of the facts cannot in law amount to acting in concert for the purpose of s 179. Furthermore at the material time the defendants already had 36.46% of the total paid-up capital in Roxy. This figure was in fact supplied by Roxy. In the circumstances, Mr Sri Ram's contention that the defendants were acting in concert for the purpose of taking over Roxy must fail.

I now come to the final question, namely, what is the test to be applied in considering whether to grant or refuse an injunction in the present case.

Mr Sri Ram referred to *Mohamed Zainuddin bin Puteh* v *Yap Chee Seng*.[7] That case was concerned with ordinary interlocutory injunction pending the trial of the action. The learned judge in that case rightly applied the principles laid down in *American Cyanamid Co* v *Ehticon*.[8] In the *American Cyanamid* case the first question to be considered was whether there was a serious question to be tried. Secondly, whether a party could be adequately compensated and thirdly, the question of balance of convenience.

The next case relied upon by Mr Sri Ram was *Cayne & Anor* v *Gobal Natural Resources*.[9] This case was also relied upon by Mr Naban. In *Cayne's* case[9] it was decided by the Court of Appeal that where the grant or refusal of an interlocutory injunction would have the practical effect of putting an end to the action, the court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice and to balance the risk of doing an injustice to either party. In such a case the court should bear in mind that to grant an injunction sought by the plaintiff would mean giving him judgment in the case against the defendant without permitting the defendant the right of trial. Accordingly the established guidelines requiring the court to look at the balance of convenience when deciding whether to grant or refuse an interlocutory injunction do not apply in such a case, since whatever the strengths of either side, the defendant should not be precluded by the grant of an interlocutory injunction from disputing the plaintiff's claim at a trial.

Mr Naban submitted that the right of the requisitionists to convene an EGM would expire soon. If the court granted the injunction the requisition would have no effect. There would be no EGM and there would be no trial of the action. Mr Naban further submitted that the *American Cyanamid* case[8] did not apply. I agree with Mr Naban's submission. The situation in the present case is that if an injunction is granted in favour of Roxy that would mean giving Roxy judgment in the case against the defendants. The defendants would have no opportunity to bring the case to trial. In view of the circumstances of this case, the court cannot apply the tests laid down in the *American Cyanamid* case. In other words the court will not consider whether there is a serious question to be tried in the present case or look at the balance of convenience. In the *Cayne* case[9] May LJ said:

> With those considerations in mind, I do not think that in cases such as the present, whatever the strengths on either side, where the decision on an interlocutory application for an injunction will effectively dispose of the claim, the court

can legitimately, nor is it bound, to apply the *Cyanamid* guidelines, which, as I have already said, I think are based on the proposition that there will be a proper trial at a later stage when the rights of the parties will be determined.

In *Cayne's* case[9] the tests to be applied are (1) the grant or refusal of an injunction would put an end to the matter without the trial of the action; and (2) the court has to consider the balance of the risk of doing an injustice. I have already dealt with the first test. With regard to the second test, I am of the view that the risk of doing an injustice is greater if the injunction is granted. On the other hand it would be doing substantial justice to the shareholders if given the opportunity to elect their new directors. See *Matang Holdings Bhd & Ors* v *Dato Lee San Choon & Ors.*[10] Whether they will succeed in passing the resolutions contained in the special notice is a matter for the shareholders to decide. The important thing is that the requisitionists had complied with the provisions of the law as contained in the Companies Act and the articles of association. They should be given the liberty to proceed with the EGM of the shareholders.

In considering the balance of the risk of doing injustice, I have to bear in mind that it has always been the policy of the court not to interfere with the meeting of shareholders if it was properly constituted and if the meeting was convened in good faith. See *Last and Anor* v *Buller & Co*;[11] *Burland & Ors* v *Earle & Ors*[12] at p 93; *Theseus Exploration NL* v *Mining and Associated Industries Ltd*[13] at p 85; and *Humes Ltd* v *Unity APA Ltd & Anor.*[14] The court however will grant an injunction to restrain a meeting and to prevent a clear abuse of powers on the part of the directors. See *Punt* v *Symons & Co Ltd.*[15]

Finally I should add that in order for the plaintiffs to succeed in obtaining the injunction to restrain a meeting of the shareholders, it must have a strong case. See *Last* v *Buller.*[11] It must show that injustice would be done to it or to the shareholders if the injunction is not granted in its favour. In the present case the plaintiffs do not have a strong case.

For the reasons stated above, I dismiss the plaintiffs' application with costs.

Application dismissed.

Solicitors: *Riza Leong & Partners*; *Skrine & Co*; *KC Yap & Kamaluddin*; *Shearn Delamore, Drew & Napier*; *SP Lim & Co.*

Reported by *Yap Shao Sin*

Koid Hong Keat v Rhina Bhar

HIGH COURT (PENANG) - CIVIL SUIT NO 23-97-87
WAN ADNAN J
2 JUNE 1989

Legal Profession - Touting - Whether touting is contrary to public policy - Contracts Act 1950, s 24 - Legal Profession Act 1976, s 77 - Legal Profession (Practice & Etiquette) Rules 1978, rr 51 & 52

The defendant was an advocate and solicitor who sought to strike out the plaintiff's action pursuant to the Rules of the Supreme Court 1980 O 18 r 19 on the ground that it discloses no cause of action. The defendant had entered into an oral agreement with the plaintiff whereby it was agreed that the plaintiff would be paid 10% of the fees collected by the defendant upon the conclusion of each case referred to the defendant for consultation, legal proceedings or otherwise. The defendant claimed that the oral agreement amounted to touting and since touting is contrary to public policy, the alleged agreement was unenforceable under s 24 of the Contracts Act.

Held, dismissing the defendant's application:

(1) Before the court can regard touting as opposed to public policy under s 24(e) of the Contracts Act, there must be shown to the court that touting has a tendency to be injurious to the public welfare.

(2) Whilst touting is prohibited under the Legal Profession (Practice and Etiquette) Rules 1978, these Rules were made by the Bar Council 'for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors' and do not apply to other people. These rules were not made by Parliament and therefore cannot be taken to reflect public opinion.

(3) There had so far not been any expression of opinion from the public either for or against touting.

(4) If the Legal Profession (Practice and Etiquette) Rules 1978 were statutory provisions the court would have had no hesitation to hold that touting is injurious to the public welfare because 'laws are reflections of the public opinion.'

(5) What is injurious to public welfare in England may not necessarily be so in Malaysia and vice versa. What is and what is not injurious to public welfare in Malaysia must be decided in the Malaysian context.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 2-180-89.]

Cases referred to

1 *Re A Solicitor* [1945] 1 All ER 445 (distd)
2 *In the matter of Phool Din & Ors* AIR [1952] Allahabad 491 (folld)
3 *Nagle* v *Feilden* [1966] 2 WLR 1027 (refd)

Legislation referred to

Contracts Act 1950 s 24
Legal Profession Act 1976 s 77
Legal Profession (Practice & Etiquette) Rules rr 51, 52
Rules of the Supreme Court 1980 O 18 r 19
Contracts Act [Ind]
Legal Practitioners Act 1879 [Ind] s 36